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FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6735

COMPLAINTS FILED: May 14 and Nov. 13, 2013

NOTIFICATIONS: May 20 and Nov. 14, 2013

LAST RESPONSE RECEIVED: Dec. 17, 2013

ACTIVATED: August 14, 2013

EARLIEST SOL: February 24, 2018

LATEST SOL: July 9, 2018

ELECTION CYCLE: 2016

COMPLAINANT:

Rob Gleason, Chair of the
Republican Party of Pennsylvania

RESPONDENTS:

Joseph A. Sestak
Friends of Joe Sestak and Edwin Wee
in his official capacity as treasurer,¹ f/k/a
Sestak for Senate and Margaret Infantino
in her official capacity as treasurer²

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(2)
2 U.S.C. § 432(e)(1)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a)
11 C.F.R. § 100.1
11 C.F.R. § 101.3
11 C.F.R. § 100.72
11 C.F.R. § 100.131

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

¹ On July 15, 2013, Friends of Joe Sestak filed an Amended Statement of Organization naming Edwin Wee as its new treasurer in place of Margaret Infantino. Statement of Organization (July 15, 2013).

² Although both Friends of Joe Sestak and Sestak for Senate were named as Respondents by the Complainant (and were separately notified of the Complaint), they are actually the same committee, identified by FEC Identification Number C00465492. Sestak for Senate changed its name to Friends of Joe Sestak on March 26, 2013. Sestak for Senate Amended Statement of Organization (Mar. 26, 2013).

I. INTRODUCTION

The Complaint alleges that Joseph Sestak and Friends of Joe Sestak f/k/a Sestak for Senate (the "Committee") violated Section 432(e)(1) of the Federal Election Campaign Act of 1971, as amended (the "Act") by failing to file a Statement of Candidacy within 15 days of becoming a candidate for the 2016 U.S. Senate election in Pennsylvania. Compl. at 3 (May 14, 2013). The Complaint alleges that Sestak became a candidate after he received — in excess of the Act's \$5,000 candidacy threshold — \$1,005,215 by December 31, 2013; that Sestak is amassing campaign funds for his candidacy rather than using these funds to explore a potential candidacy; and that Sestak and the Committee made statements referring to Sestak as a candidate for the U.S. Senate starting in June of 2013. *Id.* at 2-3; Supp. Compl. at 1-2 (Nov. 13, 2013).

Respondents deny that Sestak is a candidate, asserting that Sestak is only "testing the waters," that their level of fundraising is not unreasonable for exploring a possible race for a Pennsylvania U.S. Senate seat, and that all solicitations stated that the Committee was a "testing the waters" or "exploratory" committee. Resp. at 1-3 (June 7, 2013); Supp. Resp. at 4 (Dec. 17, 2013). According to Respondents, their activities also comply with guidance they purportedly received from "several members" of the Commission's "compliance office."³ Resp. at 1-2; Supp. Resp. at 1-2.

As discussed below, Sestak and the Committee's statements holding Sestak out as a candidate for federal office indicate that he should have filed a Statement of Candidacy as early as July 9, 2013. Because he has yet to do so, we recommend that the Commission find reason to believe that Joseph Sestak violated 2 U.S.C. § 432(e)(1). Friends of Joe Sestak has filed all

³ As explained *infra*, the Reports Analysis Division of the Commission's Office of Compliance as well as the Office of Communications' Information Division have no record that either provided any such guidance.

1 disclosure reports required of a principal campaign committee in accordance with 2 U.S.C.
2 §§ 433(a) and 434(a), however, and is not liable for Sestak's failure to file a Statement of
3 Candidacy. Accordingly, we recommend that the Commission find no reason to believe that
4 Friends of Joe Sestak and Edwin Wee in his official capacity as treasurer violated the Act with
5 respect to the facts of this matter.⁴ Finally, we recommend that the Commission authorize pre-
6 probable cause conciliation with Joseph Sestak.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Factual Background**

9 Joseph Sestak is a former Member of Congress from Pennsylvania's 7th Congressional
10 District and was a candidate for the U.S. Senate from Pennsylvania in 2010. Sestak lost the 2010
11 general election, but his campaign committee — Sestak for Senate — continued to file regular
12 disclosure reports with the Commission through the end of 2012. *See* Sestak for Senate 2012
13 Year End Report (Jan. 31, 2013). On its 2012 Year End Report, for the period ending
14 December 31, 2012, Sestak for Senate disclosed \$8,644 ending cash on hand. *Id.* On March 26,
15 2013, Sestak for Senate filed an Amended Statement of Organization changing its name to
16 Friends of Joe Sestak.

⁴ The Complaint also alleges that Respondents have failed to file a Personal Financial Disclosure Report with the U.S. Senate Ethics Committee. Compl. at 4; Supp. Compl. at 2. Because the Commission lacks jurisdiction to consider the claim, we make no recommendation as to this allegation, nor do we believe the matter warrants exercise of the Commission's authority to refer the allegation to an appropriate law enforcement authority with jurisdiction over that matter. *See* 2 U.S.C. § 437d(a)(9).

1 1. Friends of Joe Sestak's Financial Activity

2 As of March 30, 2014, Friends of Joe Sestak has disclosed that it raised a total of
3 \$1,376,984 and spent a total of \$178,714, leaving it with a cash on hand balance of \$1,207,090.⁵
4 Friends of Joe Sestak 2014 April Quarterly Report at 3-4 (Apr. 12, 2014).

5 Two weeks after Friends of Joe Sestak filed its 2013 July Quarterly Report, the Reports
6 Analysis Division ("RAD") sent Sestak a "Disavowal Notice" notifying him that Friends of Joe
7 Sestak appeared to have received contributions or made expenditures in support of his 2016
8 candidacy in excess of \$5,000. Letter from Nataliya Ioffe, RAD, FEC, to Joseph A. Sestak
9 (July 26, 2013) ("Disavowal Notice"). The Disavowal Notice asked Sestak to either disavow the
10 Committee's activities or file a Statement of Candidacy. *Id.* Friends of Joe Sestak responded to
11 the Disavowal Notice, stating that it is a "testing the waters committee" that has not conducted
12 any "candidate activities" under Commission regulations. Letter from Edwin Wee, Treasurer,
13 Friends of Joe Sestak to RAD, FEC (Aug. 30, 2013).

14 2. The Committee's Solicitations

15 As part of its purported testing the waters activities, Friends of Joe Sestak has been
16 soliciting contributions via the e-mail address info@joesestak.com. See Supp. Compl.,
17 Attachs. D, E. Between June and October 2013, the Committee sent at least eight fundraising e-
18 mails in which Sestak or the Committee characterized Sestak as "seek[ing] the U.S. Senate." *Id.*,
19 Attach. D (providing copies of e-mails dated June 24, June 26, Aug. 27, Aug. 29, Sep. 4, Sep. 23,

⁵ The first report filed under the name Friends of Joe Sestak was the 2013 April Quarterly Report, which disclosed \$8,644 beginning cash on hand, as well as \$460,250 in receipts and \$10,185 in disbursements for the first quarter. Friends of Joe Sestak 2013 April Quarterly Report at 3-4 (Apr. 15, 2013). In the second quarter, the Committee disclosed \$209,619 in receipts and \$50,264 in disbursements. Friends of Joe Sestak 2013 July Quarterly Report at 3-4 (July 13, 2013). Its receipts were \$335,346 and its disbursements were \$40,234 during the third quarter. Friends of Joe Sestak 2013 October Quarterly Report at 3-4 (Oct. 15, 2013). In the final quarter of 2013, the Committee's receipts were \$150,326 and its disbursements were \$37,743. Friends of Joe Sestak 2013 Year End Report at 3-4 (Jan. 31, 2013).

1 and Oct. 14, 2013); *id.*, Attach. E (providing copy of e-mail dated Sept. 24, 2013). While some
2 of these e-mails were sent under the name of the Committee or its treasurer, others were sent
3 under Sestak's name and included first-person statements such as, "I am honored that Sarah
4 Alfadi is hosting my first fundraising event . . . as I seek the U.S. Senate. I will win because of
5 you [] and your support." *Id.*, Attach. D (E-mail from Joe Sestak (Aug. 29, 2013, 10:10 AM));
6 *see also id.*, Attach. D (E-mail from Joe Sestak (Aug. 27, 2013, 10:58 AM) ("Would you help
7 me serve you, again? Whether in the Navy, in Congress or as I now seek the U.S. Senate . . .")).
8 Another e-mail invited recipients to "Click here to donate \$160, or whatever you can, joining the
9 thousands of people that will make Joe the 'People's Senator.'" *Id.*, Attach. D. (E-mail from
10 Edwin Wee (July 18, 2013, 6:31 AM)). These solicitations did not include any statements
11 indicating that Sestak was undecided and only testing the waters for a possible candidacy.

12 The Committee has also solicited contributions via e-mails comparing Sestak to
13 incumbent Senator Pat Toomey. One e-mail asked recipients, "While the telecom special
14 interest is supporting Toomey, we have the opportunity to make our choice clear. Who would
15 you rather have?" and then presented them with the option of either "[a] U.S. Senate ideologue"
16 or "[a] Navy Admiral." *Id.*, Attach. D (E-mail from Team Sestak (June 24, 2013, 10:09 AM)).
17 Another message invited recipients to attend a "competing fundraiser" to be held on the same
18 evening that "a top Comcast executive is holding a fundraiser against Joe for Senator Toomey[.]"
19 *Id.*, Attach. D, (E-mail from Edwin Wee (July 3, 2013, 2:20 PM)). Yet another e-mail directly
20 compared the fundraising efforts of Toomey and Sestak: "Your help will assist my catch-up
21 efforts since the Senator has raised \$3 million from 2 and 1/2 years of fundraising (I have raised
22 \$750K these past months)[.]" *Id.*, Attach. D (E-mail from Joe Sestak (Aug. 27, 2013,

1 10:58 AM)). As with the other solicitations, none of these messages includes any suggestion that
2 the effort involved either testing the waters or an exploratory committee.

3 3. Allegations and Responses

4 Based on the Committee's 2013 receipts and disbursements and the language of its
5 fundraising e-mails, the Complaint alleges that Respondents have violated and continue to
6 violate the Act by failing to file a Statement of Candidacy after triggering candidate status.
7 Compl. at 2-3; Supp. Compl. at 2-4. Specifically, the Complaint alleges that Sestak triggered
8 candidate status on February 9, 2013 — the date on which Friends of Joe Sestak exceeded
9 \$5,000 in contributions — and therefore should have filed a Statement of Candidacy by
10 February 24, 2013. Compl. at 3. The Complaint further alleges that Sestak is raising these funds
11 to use in his campaign rather than for testing the waters activities, and that Sestak's statements
12 indicate that he has already decided to be a candidate.⁶ Compl. at 3; Supp. Compl. at 1, 3-5.

13 Respondents filed two collective Responses denying the allegation and asserting that they
14 are "solely conducting testing the waters activities." Resp. at 1; Supp. Resp. at 1. In support of
15 this assertion, they contend that:

- 16 • The amount of funds that Respondents raised "is not 'unreasonable' to test the waters for
17 a Pennsylvania statewide race — where the last race was one of the top ten most
18 expensive races in the country." Resp. at 2; Supp. Resp. at 3.
19
20 • "Respondents have given no indication that [Sestak] has decided to become a candidate –
21 and all the Respondents' activities reflect such." Resp. at 1; Supp. Resp. at 1.
22
23 • All fundraising by Respondents has been conducted by clearly stating that the committee
24 is a "testing the waters" or "exploratory" committee.⁷ Resp. at 2; Supp. Resp. at 3.

⁶ The Complaint also alleges that the Respondents' violations are knowing and willful because they failed to file a Statement of Candidacy after receiving the Disavowal Notice and the Complaint. Supp. Compl. at 5-6.

⁷ Respondents also assert that all funds raised comply with the Act's contribution limits and prohibitions; Respondents kept and disclosed the Committee's financial transactions; funds have been kept in a segregated testing the waters bank account; testing the waters activity did not begin less than 90 days before the relevant election; and Respondents have not taken any action to qualify for the ballot. Resp. at 2-3; Supp. Resp. at 3.

1 Respondents further assert that they were “guided by the FEC compliance office”
2 throughout the process of forming the exploratory committee and conducting testing the waters
3 activities. Resp. at 1; Supp. Resp. at 1. In their Responses, they state that they initially called
4 the compliance office on December 26, 2012 — before initiating any testing the waters activities.
5 *Id.* They claim that, during this call, a “compliance officer directed the name of the committee to
6 be ‘Friends of Joe Sestak’” and advised them that an example of an “unreasonable” amount of
7 fundraising would be “\$10 million for a race in North Dakota.” Resp. at 1-2. Respondents
8 further claim that the compliance officer “directed the Respondents not to make any statements
9 that Joe Sestak is a candidate” and advised that they use language such as “‘seeking the U.S.
10 Senate’ rather than ‘running for U.S. Senate.’” Supp. Resp. at 2. Respondents state that they
11 were in contact with the compliance office several times between December 26, 2012, and
12 May 23, 2013, and that these phone calls “confirm[ed] that the Respondents’ fundraising process
13 was ‘reasonable,’ in compliance with testing the waters regulations, and that the Respondents
14 complied with every FEC law and regulation[.]” Resp. at 2; Supp. Resp. at 2, Attach. C (listing
15 the dates and times of these phone calls).

16 Notwithstanding Respondents’ assertion, RAD maintains detailed telephone logs of all
17 contacts with committees, and it has no record of any telephone calls from Friends of Joe Sestak
18 until May 28, 2013, when the committee inquired about the Complaint in this matter.⁸ See RAD

⁸ It is possible that instead of contacting the Office of Compliance, Respondents spoke to staff from the Office of Communication’s Information Division, which does not keep formal records of such telephone calls. Based on our inquiry with the Information Division, however, we are informed that none of the Division’s staff recalls any contact with the Committee between December 2012 and May 2013. See E-mail from Gregory Scott, Ass’t. Staff Director, FEC, to Margaret Howell, Att’y, FEC (Oct. 28, 2013, 1:55 PM).

It is also possible that Respondents spoke to staff from the Office of the General Counsel’s Policy Division in connection with a potential Advisory Opinion Request. In response to our inquiry, however, each member of the Division confirmed that he or she did not have any such contact with the Committee. See E-mail from Adav Noti, Acting Assoc. Gen. Counsel, FEC, to Margaret Howell, Att’y, FEC (Mar. 4, 2014, 1:57 PM).

1 Communication Log: Friends of Joe Sestak (Phone Call from Jeff Wee, Friends of Joe Sestak, to
2 Robin Kelly, RAD, FEC (May 28, 2013, 2:15 PM)).

3 **B. Legal Analysis**

4 Under the Act, “an individual who seeks nomination for election, or election, to Federal
5 office” is a candidate and “shall be deemed to seek nomination for election, or election” when he
6 receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). A
7 candidate is required to designate in writing a principal campaign committee within fifteen days
8 of reaching this \$5,000 threshold. *Id.* § 432(e)(1). The designated principal campaign
9 committee, in turn, is required to file a Statement of Organization within ten days of designation
10 or, alternatively, report any change in information previously submitted on its Statement of
11 Organization within ten days of the change. *Id.* § 433(a), (c).

12 The Commission has created a limited exemption to the definitions of contribution and
13 expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to
14 conduct certain activities designed to evaluate a potential candidacy (*e.g.*, to “test the waters”).
15 *See* 11 C.F.R. §§ 100.72, 100.131. Funds received and payments made “solely for the purpose
16 of determining whether an individual should become a candidate” are not considered
17 contributions or expenditures under the Act. *Id.* These funds, however, are subject to the
18 limitations and prohibitions of the Act. *Id.*

19 An individual who is testing the waters is not required to register with the Commission
20 unless and until he decides to run for federal office, or conducts activities that indicate he or she
21 has decided to become a candidate. *See id.* Commission regulations describe five non-
22 exhaustive examples of activities that indicate that an individual is not merely testing the waters,
23 but has decided to become a candidate for federal office:

- (1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office;
- (2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate;
- (3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office;
- (4) The individual conducts activities in close proximity to the election or over a protracted period of time; and
- (5) The individual has taken action to qualify for the ballot under State law. *Id.*

In this matter, statements in Committee fundraising e-mails that refer to Sestak as a candidate indicate that he had decided to run for federal office. The amount and duration of Respondents' fundraising, although not dispositive on their own, are also consistent with the conclusion that Sestak decided to become a candidate.

1. Statements Referring to Candidacy

The statements in Respondents' fundraising e-mails publicly and specifically refer to Sestak as a Senate candidate, thus indicating his decision to run for office as a United States Senator and the inapplicability of the testing the waters exemption to the Committee's contributions and expenditures.

First, as detailed above, Respondents sent at least eight e-mails from the Committee's email address over the course of four months clearly establishing that Sestak had decided to "seek" election to the U.S. Senate, including emails from the Committee as early as June 24 and 26, 2013, soliciting supporters to "... support Joe Sestak to seek the U.S. Senate" and an email from Sestak on August 27, 2013, asking, "Would you help me serve you, again? Whether in the Navy, in Congress or as I now seek the U.S. Senate . . ." See Supp. Compl., Attachs. D, E.

1 Although Respondents draw a distinction between the phrases “seeking office” and
2 “running for office,” Supp. Resp. at 2, the plain text of the Act defines a candidate as an
3 individual “who seeks . . . election[] to Federal office.” 2 U.S.C. § 431(2). Accordingly, when
4 the Commission considered the use of the term “seeking” in a previous matter, it concluded that
5 an individual had crossed the line from testing the waters to candidate status when, among other
6 things, he wrote that “I am seeking the Presidency of the United States.” Factual & Legal
7 Analysis at 4, 7, MUR 5363 (Sharpton).

8 Furthermore, when characterizing Sestak’s purpose for soliciting funds as part of an
9 effort to “seek” federal office, those messages did not indicate in any respect that Sestak was
10 simply testing the waters for a potential run or exploring the option of candidacy. *See* Supp.
11 Compl., Attachs. D, E. Instead, the messages stated that Sestak was seeking office in
12 combination with other phrases further indicating that Sestak had decided to become a candidate
13 for federal office, such as “I will win because of you [] and your support.” Supp. Compl.,
14 Attach. D (E-mail from Joe Sestak (Aug. 29, 2013, 10:10 AM)).

15 Moreover, the solicitations submitted with this matter reflect that Sestak positioned his
16 fundraising efforts in opposition to a candidate for the same office that Sestak indicated he was
17 seeking, also indicating that Sestak had concluded he would run for that office. *See* Supp.
18 Compl., Attach. D (E-mails dated June 24, June 26, July 3, July 18, Aug. 9, Aug. 20, Aug. 27,
19 Aug. 28, Sept. 20, Sept. 23, and Sept. 25, 2013, contrasting Sestak with incumbent Sen.
20 Toomey). For example, one solicitation invited recipients to a “competing fundraiser” to offset
21 “a fundraiser against Joe for Senator Toomey,” and another stated, “Your help will assist my
22 catch-up efforts since the Senator has raised \$3 million from 2 and 1/2 years of fundraising (I
23 have raised \$750K these past months) . . .” *Id.*, Attach. D (E-mail from Edwin Wee (July 3,

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1 2013, 2:20 PM); E-mail from Joe Sestak (Aug. 27, 2013, 10:58 AM)). The Commission has
2 previously found that soliciting funds to campaign against a specifically named opponent
3 constitutes a reference to oneself as a candidate and indicates a decision to seek nomination for
4 election, or election, to a federal office. Factual & Legal Analysis at 8, MUR 6449 (Bruning)
5 ("Please help me defeat Ben Nelson in 2012 by making a contribution today."); Factual & Legal
6 Analysis at 7, MUR 5693 (Aronsohn) ("Every dollar we receive in the next few weeks can help
7 us prepare for this fight against Scott Garrett.").

8 Respondents do not dispute the authenticity of these e-mails. Instead, they claim that the
9 "FEC compliance office" provided advice concerning the language of the e-mails and
10 "confirmed . . . that the Respondents complied with every FEC law and regulation[.]" See Resp.
11 at 2. These unsworn assertions are inconsistent with other information in the record before the
12 Commission. The Office of Compliance's Reports Analysis Division maintains detailed
13 telephone contact logs, but has no record that it received any call from the Committee at the
14 times the Committee identifies in its Supplemental Response, or discussing the topic of testing
15 the waters on the occasion that the Committee did contact that office. Likewise, although the
16 Information Division does not maintain formal records concerning telephone inquiries from the
17 public, none of its staffers recall speaking with the Committee during the relevant timeframe and
18 the dates and times also do not correspond to any emails that the Information Division sent in
19 response to email inquiries. E-mails from Gregory Scott, Ass't. Staff Director, FEC, to Margaret
20 Howell, Att'y, FEC (Jan. 27, 2014, 3:02 PM; Apr. 10, 2014, 9:11 AM). Moreover, the Division
21 indicates that it does not offer advice concerning testing the waters or exploratory committee
22 status outside the scope of the guidance published in the Commission's regulations and
23 Campaign Guide. *Id.*

1 Furthermore, despite the Committee's assertion that all of its fundraising materials
2 explicitly state that it is a testing the waters or exploratory committee, Supp. Resp. at 2-3, none
3 of the e-mails attached to the Supplemental Complaint contain any such information.⁹ See Supp.
4 Compl., Attachs. D, E.

5 Given Sestak and the Committee's own statements concerning Sestak's purpose in
6 soliciting funds, we conclude that under the Act and the Commission's testing the waters
7 regulation, consistent with prior Commission decisions, Sestak had decided to run for federal
8 office and thus had become a candidate as early as June 24, 2013, the date of the earliest
9 solicitation in the current record.¹⁰

10 2. Duration and Amount of Fundraising

11 The Complaint here also relies on the length of time the Respondents have engaged in
12 fundraising activities and the amount raised in excess of what could reasonably be expected to be
13 used for an exploratory committee in support of the allegation that Sestak failed to file a
14 Statement of Candidacy when he triggered candidate status. Raising funds "in excess of what
15 could reasonably be expected to be used for exploratory activities or undertak[ing] activities
16 designed to amass campaign funds that would be spent after he or she becomes a candidate" are
17 listed examples of activities that indicate an individual's decision to be a candidate and,

⁹ The Committee submitted a copy of its website's "contributions" page, which identifies Friends of Joe Sestak as an exploratory committee. See Supp. Resp., Attach. B. Possibly, then, the Committee's assertion is premised on the view that its fundraising e-mail solicitations provide a link to this contributions page. We are simply surmising, however, as the Committee did not make that claim, and further, we lack the necessary factual basis to determine whether all of the fundraising e-mails in fact provide a link to that page. Even if so, Sestak and the Committee's references to Sestak's ambitions for federal office in the communications submitted with the Complaints in this matter in our view provide ample reason to believe that Sestak had decided to run for office, regardless of any statements contained on the Committee's contributions webpage.

¹⁰ While the earliest statement referring to Sestak as a candidate appears in an e-mail dated June 24, 2013, it is possible that Sestak or the Committee previously made similar statements that are not reflected in the current record. Nonetheless, because the Committee has filed all reports required regardless of the date on which Sestak concluded he would run for office, we do not believe further investigation to confirm that date is warranted here.

1 therefore, that the testing the waters exemption is no longer applicable. 11 C.F.R.
2 § 100.72(b)(2). Because the statements of the Committee and Sestak both reflect that Sestak had
3 decided to campaign for federal office, the amount and duration of his fundraising is not central
4 to our assessment. Nonetheless, we note that the extent of his fundraising activities here is
5 consistent with the conclusion that he had decided to run.¹¹

6 3. Conclusion

7 We recommend that the Commission find reason to believe that Sestak violated 2 U.S.C.
8 § 432(e)(1) by failing to file a Statement of Candidacy within 15 days of becoming a candidate.
9 That Section does not apply liability to the campaign committee of a candidate, however, and the
10 Committee is properly registered and filing reports with the Commission in accordance with
11 2 U.S.C. §§ 433(a) and 434(b). We therefore recommend that the Commission find no reason to
12 believe that the Committee violated the Act in connection with this matter.¹²

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¹¹ Based on prior Commission precedent, we believe that neither the amount Sestak raised nor the time he has spent doing so would be sufficient without more to conclude Sestak had become a candidate. First, although it is true that engaging in testing the waters "activities over a protracted time period would appear to diminish their usefulness for testing the waters purposes and would conversely suggest" that such activities were building support for a campaign, Advisory Op. 1981-32 (Askew) at 5, the Committee's thirteen months of fundraising (from March 2013 to present) is not necessarily a "protracted period of time" for the purpose of determining candidacy. Second, although the Commission has considered fundraising as an indicator of candidate status in several previous matters, it has not found that a high level of fundraising by itself indicates that an individual has gone beyond testing the waters and decided to become a candidate. See Factual & Legal Analysis at 6 n.2, MUR 6224 (Fiorina) (concluding that a 2010 Senate exploratory campaign in California raising \$611,000 and spending \$329,000 did "not appear to exceed what could reasonably be expected to be used for exploratory activities" based on the costs of the previous three senate elections in that state); Statement of Reasons, Comm'rs. Petersen, Hunter, McGahn, & Weintraub and First Gen. Counsel's Rpt. at 5, MUR 5934 (Thompson) (dismissing allegation where 2008 presidential campaign raised \$9.5 million and spent \$2.5 million during exploratory period).

¹² The Complainant further alleges that the violation is knowing and willful based on Sestak's failure to file a Statement of Candidacy following the Respondents' receipt of the Complaint and RAD's Disavowal Notice. Supp. Compl. at 4-5. We do not recommend such a finding, as we see no basis to conclude on the current record that the Respondents intentionally rejected a known legal obligation.

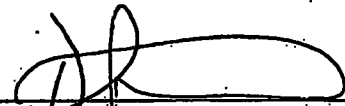
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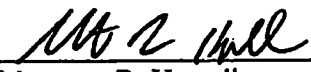
IV. RECOMMENDATIONS

1. Find reason to believe that Joseph Sestak violated 2 U.S.C. § 432(e)(1).
2. Find no reason to believe that Friends of Joe Sestak f/k/a Sestak for Senate violated the Act with respect to the facts of this matter.
3. Enter into conciliation with Joseph Sestak prior to a finding of probable cause to believe
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.

5/1/14
Date


Daniel A. Petalas
Associate General Counsel


Mark Shonkwiler
Assistant General Counsel


Margaret R. Howell
Attorney